

**OPINION  
59-151**

April 10, 1959 (OPINION)

JUSTICE COURT

RE: Criminal Actions - Indigent Defendant - Attorney not appointed f

This is in reply to your request for an opinion whether or not under the North Dakota laws an indigent defendant is entitled to a court appointed attorney at public expense in matters before a police magistrate or justice of the peace.

The question as to when a defendant is entitled to an attorney at public expense to be appointed by the court is far from settled in this country. There are some views expressed that the constitutional guarantee relates only to the right to be represented by counsel but does not necessarily include that counsel be provided for and paid by public moneys. There are other views apparently in the minority holding that an indigent defendant is entitled to court appointed counsel paid by public expense in all phases of trial. This rule is particularly applicable to federal cases. Still others hold that he is entitled to such counsel only in serious cases.

The above views were adopted by some jurisdictions without resort to state statutes. The majority view seems to be, in the absence of any specific statute, that an indigent defendant is entitled to court appointed counsel to be paid from public moneys in all felonies and capital cases.

In North Dakota we have the following statutory provision:

Section 27-0831 of the 1957 Supplement to the North Dakota Revised Code of 1943 states:

"ASSIGNMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN COUNTY COURTS HAVING INCREASED JURISDICTION. In all criminal cases in the county court having increased jurisdiction, when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall assign counsel for the defense and allow and direct to be paid by the county in which said court is held a reasonable and just compensation to the attorney or attorneys assigned for such services as they may render, but such compensation shall not exceed fifty dollars in any one case."

And section 29-0127 of the 1957 Supplement to the North Dakota Revised Code of 1943,

"INDIGENT DEFENDANT; ATTORNEY APPOINTED; COMPENSATION; LIMITATION. In all criminal actions when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall appoint and assign counsel for his defense and allow and direct to be paid by the county in which such trial is had a reasonable and just

compensation to the attorney so assigned for such services as he may render, but such attorney shall not be paid a sum to exceed twenty-five dollars per day in any one case.

Neither of these sections directly or indirectly refer to police magistrate court or justice court.

It would appear that where the legislature provided for appointment of attorneys in matters before county courts of increased jurisdiction and district court only, that such statutes would be controlling.

It is also recognized that the jurisdiction of the police magistrate court and justice court is limited to certain misdemeanors.

Referring to some of the decisions in other jurisdictions, it does not appear that the constitutional rights of any individual being tried in a police magistrate court or justice of peace court are being denied by not appointing at public expense counsel for such defendant. As to defendants who are accused of a crime, triable only in the district court, and who appear before a justice of the peace on a preliminary hearing, we do not believe that the constitution requires that such individuals be represented at the preliminary hearing before the justice of the peace. The preliminary hearing is not actually a trial, but is merely a proceeding to determine whether or not there is reasonable ground for believing that a crime was committed and that the defendant is probably guilty of such crime or that there is strong suspicion that the defendant committed the crime. (89 N.W.2d. 881). While it might be considered well to have a defendant represented in all stages of proceedings where he is accused of a felony, it is not necessary that he be represented at public expense at a preliminary hearing. One charged with a crime has no constitutional right to preliminary hearing, since such right is purely statutory and is bounded by statutory provisions pertinent thereto. (89 N.W.2d. 881). We believe that the law is fairly well settled that a defendant accused of a felony is entitled to be represented in all stages of the trial by an attorney, but it is not required that the defendant be represented at public expense at all stages of any proceedings. (Preliminary hearing). A preliminary hearing not being part of the trial as such, it cannot be claimed error if he is not represented at the preliminary hearing. The preliminary hearing is in a sense a similar proceeding as to that of a grand jury. In proceedings before the grand jury the defendant is not entitled to participate or appear. The main question there is whether or not a crime probably was committed and if it is probable that a certain individual committed the crime. The defendant in the proceedings under the grand jury is advised only of the decision of the grand jury. It would therefore follow that if the defendant is not entitled to participate in proceedings before a grand jury, under federal law he has no constitutional right to be represented at public expense in a preliminary hearing.

It is also noted that under section 40-1819 of the 1957 Supplement to the North Dakota Revised Code of 1943 that appeals may be taken from the police magistrate or village justice as provided for in chapter 33-12. Section 33-1234 of the 1957 Supplement to the North Dakota Revised Code amongst other things provides that "Any defendant having

pleaded guilty without the advice of counsel shall, within thirty days thereafter, upon application of his attorney, be entitled to have any judgment entered on such plea vacated and a new trial granted." The statute does not provide for any court appointed attorney but merely states "upon application of his attorney" he may have the judgment vacated and a new trial granted.

We cannot infer from any of these provisions that the court is required to appoint an attorney to be paid at public expense for an indigent defendant in matters relating to a misdemeanor triable by a police magistrate or justice court.

It is our opinion that the statutes quoted above are controlling.

The North Dakota statutes provide for the appointment of attorneys for indigents by the district court or county judge of increased jurisdiction and do not limit such appointment to cases involving a felony. Being the North Dakota statutes on guaranteeing of constitutional rights (appointment of attorneys at public expense) provide for greater services to the indigent person than is set out in the majority view, previously stated, it is proper to assume that the indigent person is not denied any constitutional right.

It is our opinion that there is no authority to appoint an attorney to be paid for by public moneys to represent indigent persons in matters before a police magistrate or justice court. Neither can a city be compelled to do so.

We have confined ourselves in this opinion strictly to the constitutional and statutory rights of indigents. We refrained from expressing any thoughts or philosophy as to what the law should be, for that is a matter for the people of this state or the legislature to determine.

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